1994

Schwartz v. Schwartz : Brief of Appellee

Utah Court of Appeals

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IN THE COURT OF APPEALS

OF THE STATE OF UTAH

940396

JERRI K. SCHWARTZ,	:	
Plaintiff-Appellee,	:	Case No. 940396 CA
vs.	:	Oral Argument Priority 4
RANDALL I. SCHWARTZ,	:	
Defendant-Appellant.	:	

BRIEF OF APPELLEE

APPEAL FROM THE FOURTH JUDICIAL DISTRICT COURT
IN AND FOR UTAH COUNTY, STATE OF UTAH,
HONORABLE ANTHONY W. SCHOFIELD

DON R. PETERSEN and
LESLIE W. SLAUGH, for:
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JURISDICTION & NATURE OF PROCEEDINGS BELOW

Jurisdiction is conferred on the Court of Appeals pursuant to Utah Code Annotated § 78-2a-3(2)(i) (Supp. 1994), which grants jurisdiction for appeals from district courts involving domestic relations cases.

ISSUES PRESENTED

A. Factual Issues

1. Was there sufficient evidence to support the court's finding as to Father's income?

2. Was there sufficient evidence to support a finding that Father had borrowed money from the children's trust accounts to invest in marital business?

B. Discretionary Issues

1. Did the trial court abuse its discretion in awarding custody of the children to the mother, where the mother was more flexible with the children and had a better relationship with the oldest daughter than the father, and wanted to keep all of the children together?

2. Did the trial court abuse its discretion in awarding one-half of the marital home to the wife,

where the home had been jointly deeded to husband and wife as a gift from the husband's parents?

3. Did the trial court abuse its discretion in dividing the marital business without joining the husband's parents as parties?

4. Did the trial court abuse its discretion in requiring the husband to pay half of the total fees for the custody evaluator?

STANDARDS OF REVIEW

A. Factual Issues

Findings of fact are reviewed under a clearly erroneous standard. Walton v. Walton, 814 P.2d 619, 621 (Utah Ct. App. 1991). A party seeking to overturn the trial court's findings of fact must marshal the evidence in support of the Findings and demonstrate that "despite such evidence, the findings are so lacking in support as to be against the clear weight of the evidence and, therefore, clearly erroneous." Id. In short, the appellant must take the position of devil's advocate, presenting all evidence supporting the trial court's findings, then exposing a flaw sufficient to demonstrate the trial court's finding was clearly erroneous. West Valley City v. Majestic Inv. Co, 818 P.2d 1311, 1315 (Utah Ct. App. 1991). When an appellant has failed to marshal the evidence, the reviewing court assumes that the trial court's findings of fact are supported by the record. Walton, 814 P.2d at 621. The Utah Court of Appeals has "shown no reluctance to affirm when the appellant fails adequately to marshal the evidence." Interiors Contracting, Inc. v. Smith, Halander & S, 247 Utah Adv. Rep. 6 (Utah Ct. App. 1994).

B. Discretionary Issues

Custody decisions are reviewed under an abuse of discretion standard. Woodward v. Woodward, 709 P.2d 393, 394 (Utah 1985). In Woodward, the Utah Supreme Court held that in reviewing child custody determinations, "we accord substantial deference to the trial court's findings and give it considerable latitude in fashioning the appropriate relief. We will not disturb that court's actions unless the evidence clearly preponderates to the contrary or there has been an abuse of discretion." Id. (citations omitted). See also Barnes v. Barnes, 857 P.2d 257, 259 (Utah Ct. App. 1993); Sukin v. Sukin, 842 P.2d 922, 923 (Utah Ct. App. 1992).

Division and awards of marital property are also reviewed under the abuse of discretion standard. As established by the Utah Supreme Court in Newmeyer v. Newmeyer, 745 P.2d 1276, 1277, "[i]n making such orders, the trial court is permitted broad latitude, and its judgment is not lightly disturbed." The Utah Court of Appeals further held: "the trial court has considerable latitude in adjusting financial and property interests, and its actions are entitled to a presumption of validity." Naranjo v. Naranjo, 751 P.2d 1144, 1146 (Utah Ct. App. 1988) (citations omitted). The division of assets will only be disturbed, continued the Naranjo Court "if there was a misunderstanding or misapplication of the law resulting in substantial prejudicial error. . . ." Id.

As for the remaining issues, whether or not to join a party under Rule 19 of the Utah Rules of Civil Procedure is also discretionary and will not be overturned absent an abuse of discretion. Landes v. Capital City Bank, 795 P.2d 1127 (Utah 1990). And an award of attorney fees or costs (in this case half of the custody evaluators' total fees) is likewise discretionary. Crockett v. Crockett, 836 P.2d 818, 821 (Utah Ct. App. 1992); Rudman v. Rudman, 812 P.2d 73, 77 (Utah Ct. App. 1991).

A court of equity only abuses discretion if there exists "no reasonable basis for the decision." Crookston v. Fire Ins. Exch., 860 P.2d 937, 938 (Utah 1993). Only if the trial judge's ruling is "so unreasonable that it can be classified as arbitrary and capricious or a clear abuse of discretion" will it be reversed. Judge Norman H. Jackson, "Utah Standards of Appellate Review," Vol. 7. No. 8. Utah Bar J. 9, 19-20 (citing Kunzler v. O'Dell, 855 P.2d 270, 275 (Utah Ct. App. 1993); and Ames v. Maas, 846 P.2d 468, 476 (Utah Ct. App. 1993)).

PERTINENT STATUTORY AUTHORITY

Utah Code Ann. §78-45-7.5(7)(a) (1990) (emphasis added):

> Income may not be imputed to a parent unless that parent stipulates to the amount imputed *or a hearing is held and a finding made that the parent is voluntarily unemployed or underemployed.*

Rule 19(a) Utah Rules of Civil Procedure (1987) (emphasis added):

> **Persons to be joined if feasible.** A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action

> shall be joined as a party in the action *if* (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.

Rule 19(b) Utah Rules of Civil Procedure (1987):

> **Determination by court whenever joinder not feasible.** If a person as described in Subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismisses, the absent person thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measure, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for non-joinder. . . .

STATEMENT OF THE CASE

A. Nature of the Case and Proceedings Below

This is a divorce action involving issues of custody and property division. The parties to this action, Jerri K. and Randall I. Schwartz, were divorced in the first part of a bifurcated proceeding on September 14, 1993. (R. 172.) On December 20, 1993, trial on the issue of custody and visitation of

the couple's four children was held before Judge Anthony Schofield of the Fourth District Court for Utah County. (R. 212-19.) The disposition of the marital home, business and personal property, as well as issues of support, took place in a subsequent proceeding on March 1, 1994. The court issued its ruling dated March 30, 1994. (R. 316.)

B. Disposition at Trial Court

At trial, the plaintiff, Jerri K. Schwartz (Appellee in this action) received primary physical custody of the children in a joint custody arrangement. She also received the marital home. Appellant Randall I. Schwartz received the marital business and joint custody of the children.

C. Relevant Facts

During their marriage, the couple had four children and acquired a home, a business, and various debts. The home was a gift to them from Mr. Schwartz's parents, who deeded it jointly to both parties over a period of three years. (R. 308-11.) The marital business, a feed store, began operations in 1987. (R. 308.) In order to finance the business, the couple took loans from Mr. Schwartz's parents totalling $66,333.00. In adjusting the disposition of the business to the parties, the court took into account the amounts owed by the parties to Mr. Schwartz's parents. (R. 306-08.) At one point, the couple borrowed $7,000 from trust accounts that had been set up for the children by Mrs. Schwartz's family; this money was used to pay bills for the business. The

court included these trust account loans as liabilities in its valuation of the business. (R. 306.)

Before ruling on the custody issues, the court appointed a custody evaluator and ordered that both parties share equally the expenses incurred thereby. (R. 180-81.) The trial court resolved the issue of custody by giving joint custody to both parents, Mrs. Schwartz having primary physical custody of the children. (R. 322.) The trial court found that both parties were good parents, but given the mother's somewhat more flexible nature and better relationship with the older daughter, the court ruled that Mrs. Schwartz would be best suited as the primary custodial parent. (R. 299.)

The disposition of property was somewhat more complicated. The marital home, which had been a gift to both parties deeded to them over a period of three years, was given to Mrs. Schwartz; she was required to pay Mr. Schwartz a sum representing a half interest in the equity of the home. The marital business was given to Mr. Schwartz; he was required to pay Mrs. Schwartz a sum representing a half interest in the equity of the business. The court evened out the various liabilities the parties owed each other by adjusting the amount of home equity owed by Mrs. Schwartz to Mr. Schwartz. (R. 320-21.) In addition, Mr. Schwartz was required to pay back the $7,000 taken from the children's trust funds and used in the business. (R. 298.)

As to the issue of child support, the court found that Mr. Schwartz was drawing an income of $1000 monthly from the feed business. However, the court imputed income to him of $1,750 monthly for several reasons: the sum represented his actual income from the store; he was able bodied; and he had made even more money than that prior to voluntarily terminating his former job to operate the feed store full-time. (R. 304.) Because the issues in this case are primarily fact-dependent, a more detailed discussion of the case will be provided in the body of the argument.

SUMMARY OF THE ARGUMENT

This Court should affirm the factual findings and discretionary decisions made by trial court below. First, all factual findings must be upheld because all are adequately supported by the record; furthermore, since Mr. Schwartz has failed to marshal the evidence this Court must assume they are sufficiently supported and, consequently, not clearly erroneous. As to factual Issue I, the trial court's determination of Father's income was sufficiently supported by the record. Imputing income to Father was proper since the court made an explicit finding that he was voluntarily underemployed. As to Issue II, there was sufficient evidence to support the trial court's determination that Father borrowed money from the children's trust accounts to invest in the marital business.

Second, the remaining discretionary decisions of the court must also be affirmed because each was supported by reasonable

bases and were neither arbitrary, capricious, nor an abuse of discretion. In deciding Issue III, the trial court did not abuse its discretion in awarding physical custody of the children to Mother based on the Father's rigidity, inflexibility and strained relationship with his oldest daughter, because Mother had a better relationship with this daughter and the court wanted to keep all of the children together. The court did not abuse discretion in deciding Issue IV when it awarded half of the marital home to the Mother after finding that it was marital property; Utah law presumes that marital property will be divided equally. Neither did the court abuse its discretion in finding it marital property, despite the declarations of Husband's parents that the home was for Husband's inheritance only. Husband's parents deeded the property to both parties as tenants in common and Utah law presumes the grantor's intent from the unambiguous reading of the deed. The intent to deed to both is further manifest in the favorable gift tax consequences the parents received with a joint gift. Finally, As to Issue V, the court did not abuse its discretion in requiring each of the parties to pay half of the total fees of the court-appointed custodial evaluator, including fees from in-court testimony regarding the evaluation. No finding of 'need' or finding of 'ability to pay' was needed since these were not costs of either party but were court costs.

ARGUMENT

I. There Was Sufficient Evidence To Support The Trial Court's Finding Of Father's Income; Because Father Has Failed To Marshal The Evidence, The Finding Must Be Taken As True.

Mr. Schwartz' phrasing of the issue ("Did the trial court improperly impute income to defendant?"), is an attempt to characterize a factual issue as a question of law. The trial court's findings as to Mr. Schwartz' income were findings of fact. The trial court's conclusions regarding how much support he must pay to the children were inextricably connected to its findings of fact and were a direct result of that factual finding. This Court recently dealt with a similar situation in Oneida/SLIC v. Oneida Cold Storage, 872 P.2d 1051 (Utah Ct. App. 1994). In that case Oneida attempted to characterize two issues as being questions of law but this Court found that the trial court's disposition of the case "resulted from the trial court's findings of fact and not from its application, interpretation or choice of law. Thus despite Oneida's characterization, all the issues presented on appeal dispute the trial court's findings of fact." Id. at 1052.

The question to be asked is whether there was sufficient evidence to support the trial courts's findings regarding the husband's income? The following findings of fact support the trial court's determination:

> 68. Father is still residing with his parents [he does not have to pay rent] . . . .

69. Prior to November, 1992, Father worked for the LDS Church as a custodian. Before his voluntary termination of employment with the Church, he was making $10.61 an hour, or approximately $1,800.00 per month.

70. Following termination with the Church, Father went to work at the feed store. He draws $1,000.00 per month from the business, although the accountant reviewing the books of the business testified that in 1993, Father also took a $9,000 draw from the business which was not explained or contradicted.

71. Father has not sought other employment. He is trying to protect his parent's investment.

72. Father is in good health.

76. Father has an income of $1,000.00 per month, but he also took the additional $9,000.00 draw in 1993, a total of $21,000.00. He thus had an income in 1993 of $1,750.00 per month. It is appropriate that this income be imputed to him in that amount as he has control over the store; its debts, other than to parents have been reduced; he is able bodied; and while working for the church, he made even more. He now works in the store primarily to rescue his parents' investment. The children suffer from less than they deserve if he is able to base his support on the monthly draws which he takes from the store, rather than on all of the income he took from the store last year, an amount more nearly like what he earned before working in the store. For purposes of calculating child support, Father's income is imputed at $1,750.00 per month.

(R. 304-05.) These findings clearly support the trial courts conclusions as to father's income. As husband has failed to marshal the evidence in favor of these findings nor shown that they were nonetheless 'clearly erroneous' this court must take them to

be true. West Valley City v. Majestic Inv. Co., 818 P.2d 1311, 1315 (Utah Ct. App. 1991).

The findings further meet both the statutory and the common law requirements for imputing income. Under Utah Code Annotated §78-45-7.5(7)(a):

> Income may not be imputed to a parent unless that parent stipulates to the amount imputed *or a hearing is held and a finding made that the parent is voluntarily unemployed or underemployed.*

In this matter a hearing was held and the court made the finding that father "voluntarily terminated" his more lucrative employment as custodian of the LDS Church. (R. 305, Finding 69, 76.) The Court further found that he had been making more money at his previous job and was voluntarily and purposefully underemployed as he tried to protect his parents investments; he was capable of making more money; and he has less debt load and no rent to pay. Id. Surely these facts meet the common law requirement of Hall v. Hall, 858 P.2d 1018 (Utah Ct. App. 1994), that at the time of trial husband was voluntarily underemployed. The trial court did not say that husband was underemployed 'to avoid paying more child support', nor does the law require the underemployment to be with 'wrongful intent' or for 'malicious reasons.' To impute income the law requires voluntary underemployment and this was explicitly found by the court. This Court should thus uphold the trial court's findings as to husband's income because they were not clearly erroneous.

II. There Was Sufficient Evidence To Support A Finding That Father Borrowed Money From The Children's Trust Accounts To Invest In Marital Business; Because Father Has Failed To Marshal The Evidence, The Finding Must Be Taken As True.

The trial court made the following finding of fact concerning the money traced to the children's trust accounts that was used to pay bills for the business. The trial court found:

> 63. The *parties* borrowed $7,000.00 from the children's trust accounts which the children received from Mother's family. These monies were used to pay the bills for the business. Mother testified that they intended to repay these loans with interest. Father testified that he was not aware the money was borrowed.
>
> 64. The amount of the loans from the children's trust accounts should be included in the liabilities of the business.

(R. 306) (emphasis added). This is the finding that husband disputes, but yet again he has failed to marshal the evidence in its favor and then show that despite such evidence the finding was clearly erroneous. West Valley City v. Majestic Inv. Co., 818 P.2d 1311, 1315 (Utah Ct. App. 1991). The purpose of this marshaling requirement is to promote "efficiency and fairness": efficiency because the trial judge is in the best position to weigh the evidence and credibility of the witnesses; fairness because the appellant has the burden of proving the facts wrong, and neither the appellee nor the appellate court should be forced to shoulder that burden. Oneida, 872 P.2d at 1053-54. As Mr. Schwartz has not marshaled the evidence this Court must find that there was

sufficient evidence to support the findings and accept them as true.

As the findings indicate, Mrs. Schwartz testified at trial concerning this money taken from the trust fund and used in the marital business. Although Mr. Schwartz would like to have seen records and cancelled checks, and would stress his lack of knowledge of the loan (Appellant's Brief at 18) neither of these items would necessarily preclude the trial court's finding. The trial judge, evidently weighing the credibility of the witnesses, chose to believe Mrs. Schwartz's account. Indeed, it is quite odd that the husband did not ask any questions regarding the origin of $7,000.00 which suddenly came into his wife's possession. But even if he honestly did not know about the money's origin, the court found it was traceable to the children's trust funds and that husband shared equally in its expenditure. It was not clearly erroneous (nor an abuse of discretion should that standard be used) to find that he should equally share in its repayment.

III. The Trial Court Did Not Abuse Its Discretion In Awarding Custody Of The Children To The Mother, Where The Mother Was More Flexible With The Children And Had A Better Relationship With The Oldest Daughter Than The Father, And The Court Wanted To Keep All Children Together.

Husband's brief contains erroneous assertions that the "trial court found both parents were good parents, and left the Children with the Plaintiff because she was in the home and had been since the separation." (Appellant's Brief at 6, citing R. 361, Findings 48 & 49.) The true context of findings 48 and 49 reveals that the

trial court was not concerned with custody at this point, but with the division of property, namely the home:

> 48. Mother desires to live in the home. She has custody of the children and they have lived in the home since 1984. It is in the best interests of the children and the Mother that they be permitted to reside in the home during the growing years.
>
> 49. Mother is awarded the home.

(R. 308.) The actual reasons given for custody can be found at Findings 2 through 25. Joint custody was awarded because both father and mother are good parents with their children's best interests at heart. However actual physical custody was given to mother because, although father was found a good parent, all things were not equal. Among the factors tipping the balance in mother's favor, the court found that she "has provided the greater portion of parental care as between the parents. . . ." (R. 313, Finding 22.) In addition the court found that "[t]he Father is more rigid and somewhat less flexible than Mother." (Id., Finding 20.) But the key deciding factor in awarding physical custody to Mrs. Schwartz was the fact that the children should remain together, and that the oldest daughter has a "strained relationship with Father . . . [h]e has not understood her as well and does not relate as well with her as does Mother." (R. 314, Findings 11-16.) Since the court found it was better to keep the oldest daughter with mother, and that all the children should remain together, this dictated the court's conclusion that mother should retain physical custody and not the fact that she has lived in the home.

Thus, contrary to the assertions of Mr. Schwartz, the trial court did not find that both parties were "equal" and give custody to Mrs. Schwartz only because she was a woman/mother, nor were there any implications of this in the court's findings or in the trial transcript. Mr. Schwartz further incorrectly states that Dr. Stewart, the custody evaluator, concluded that Mrs. Schwartz should have the children "because Defendant had not proven her unfit." (Appellant's Brief at 8 citing the Record at 189.) The record clearly contradicts this charge. At the trial Mr. Schwartz' counsel asked Dr Stewart: "So then it is your testimony that given all things equal, a mother should always have custody." Dr. Stewart responded: "I said no such thing." (Transcript 1/20/94 at 51.) Dr. Stewart further testified that Mrs. Schwartz had "better parenting skills and a better relationship, especially with Keri, and better long range potential for caring." (Id. at 48.) She also testified that the father's rigidity could be harmful to the children, (Id. at 35, 20); that he is high on the "lie scale" or has the tendency to minimize his faults and deny his psychological problems (Id. at 29); and that he has a very strained relationship with his oldest daughter, who would prefer to live with her mother (Id. 12-13.)

Husband further insinuates that the court improperly adopted the custody evaluator's report and did not make its own decision. This statement is wholly unsupported by the record. The court's findings are quite extensive and clearly indicate the decisional

process used to reach the custodial determination. (R. 311-315 Findings 1-25.)

Husband also cites Fletcher v. Fletcher, 615 P.2d 1218 (Utah 1980), and Smith v. Smith, 793 P.2d 407 (Utah Ct. App. 1990), regarding the interference with custodial visitation and antagonism towards the other parent in the presence of the children. Surely these cases do indicate important reasons for or against awarding custody to one parent or the other. However, the trial court found in Finding 24. e., "Each parent so far has been and is capable of encouraging positive relationships between the children and the other parent. The Court is impressed with the maturity of the parents and the willingness they demonstrated to work cooperatively together in the best interests of the children." (R. 311.) Also Findings 5 through 7 indicate that while the children were in the temporary custody of their mother they visited every other weekend and had two mid-week visits with their father, and that due to this the bond between the children and each of the parents was strong. (R. 315.) Furthermore, at trial Dr. Stewart testified that of the two parties Mrs. Schwartz is more receptive to visitation than is the father. (Trial Transcript 1/20/94 at 25.)[1]

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[1]Again at page 8 of Appellant's Brief, counsel for husband has misrepresented trial testimony. Mrs. Schwartz testified under cross examination that she never cut her husband's picture out of family pictures, that she allowed the children to have pictures of him in their room, that she merely removed their wedding picture and replaced it with her parent's wedding picture. (Tr. 1/20/94 at 124-25). At the most the citations quoted by husband divulge that

Mr. Schwartz has not proven these findings clearly erroneous. He has not even attempted to marshal evidence in their favor. Rather he has selected portions of the transcript which support his desired outcome. Like the claimant in Oneida, Mr. Schwartz "has merely presented carefully selected facts and excerpts of trial testimony in support of its position. Such . . . is nothing more than an attempt to reargue the case before this court--a tactic we reject." 872 P.2d 1051 at 1053 (citations omitted).

The trial court found that despite the qualifications and moral integrity of both parents, that all things were not equal: because the oldest daughter has a strained relationship with her father, and because this child should remain with the other children, the mother should have physical custody of all the children. This is a perfectly valid basis upon which the trial court exercised its discretion. This Court should uphold the trial court's custody determination.

IV. The Trial Court Did Not Abuse Its Discretion In Awarding One-half Of The Marital Home To The Wife, Where The Home Had Been Jointly Deeded To Husband And Wife As A Gift From The Husband's Parents.

Mrs. Schwartz has called her husband a "jerk," "petty," and when he was trying to force an issue that wasn't true she said, "That's not true. That's a lie." (Tr. 1/10/04 139). The so-called "assault on Defendant" that husbands brief refers to could not meet any definition of that term. Wife removed a saddle from husbands' horse. This is a far cry from assaulting him. (Tr. 1/20/94 157). These selected passages from the trial transcript represent husband's effort to reargue this case on appeal and should not be tolerated by this court. Oneida, 872 P.2d 1051 at 1053.

Husband appeals the trial court's finding that the family home was a "marital asset" and thus claims that the trial court abused its discretion in awarding wife the home, and husband one-half of the equity in the home. Husband's claims should be denied for two reasons. First, the property was intended as a joint gift to husband and wife. This was a factual finding of the court that must be accepted as true since husband has failed to marshal the evidence. Second, even if the property were an inheritance for (or a gift to) husband alone, the trial court would still maintain discretion as to its division.

A. It Remains An Undisturbed Fact That Husband's Parents Intended Joint Gift Of Property.

The trial court found that the property in question was not a gift or inheritance for husband, but rather a joint gift to husband and wife. (R. at 309, Finding 39.) While the trial court addressed husband's parents' contentions that the gift was for his inheritance only, the court did not find such testimony credible. (R. at 308-09, Findings 34, 39.) Even if uncontroverted the court could choose not to believe the parents' statement of intent. Homer v. Smith, 866 P.2d 622, 627 (Utah Ct. App. 1993). Moreover, their statements of intent were controverted by their own later statements and their express actions. Husband's parents testified at trial that the property was given to both parties as tenants in common "to keep the peace" and because they thought the parties would be "together forever." (R. 309; Finding, 39.) This

statement clearly shows intent for a joint gift. Their actions in deeding the property to both husband and wife as "tenants in common" is further evidence of their intent. (R. 309, Findings 38, 39.) And while, as husband has noted, title is not the sole determining factor in a property's characterization (Workman v. Workman, 652 P.2d 931 (Utah 1982)), under Utah law the parents' intent was manifest in the deed. "'If the contract is in writing and the language is not ambiguous, the intention of the parties must be determined from the words of the agreement.'" Crowther v. Mowler, 876 P.2d 876, 879-80 (Utah Ct. App. 1994) (quoting Winegar v. Froerer, 813 P.2d 104, 108 (Utah 1991). That the home was intended to be held as "tenants in common" is further strengthened by the fact that unless the gift was indeed to both parties, the parents would not have received the favorable gift tax consequences that they enjoyed. (R. at 309, Finding 39.)

Intent is a question of fact. Fitzgerald v. Corbett, 793 P.2d 356, 358 (Utah 1990) (noting that contractual intent is a question of fact). The trial court held that the intent of the parents was to deliver the property to both husband and wife. (R. 309, Finding 39, 40.) As demonstrated by the previous paragraph, the record supports this factual determination. Additionally, because husband has not marshaled the evidence in favor of the finding and then shown that it was "clearly erroneous" this Court must accept it as true that the parties intended the property to be a joint gift and not an inheritance. It naturally follows that the property is a

marital asset. Based on these findings, the trial court could not have abused its discretion in equally dividing the property between the parties: "once a court makes a finding that a specific item is marital property, the law presumes that it will be shared equally between the two parties. . . ." Hall v. Hall, 858 P.2d 1018, 1022 (Utah Ct. App. 1994).

B. Even If The Property Were An Inheritance Or Gift To Husband Only The Trial Court Would Still Retain Discretion To Divide It As Equity Demanded In The Circumstances.

Even if the property were considered an inheritance or gift of husband only, husband has not shown that the equal division of such was, under the circumstances, an abuse of discretion. Husband cites Mortensen v. Mortensen, 760 P.2d 304 (Utah 1988), as holding that an inheritance or gift to one spouse made during the marriage is not marital property and should be awarded to that spouse only. Such is an oversimplification of the holding in that case. In Mortensen, the Utah Supreme Court analyzed all of the other Utah cases on point, some which have upheld divisions of inherited property to the non-inheriting spouse (citing Weaver v. Weaver, 442 P.2d 928 (Utah 1968); Bushell v. Bushell, 649 P.2d 85 (Utah 1982); and Dubois v. Dubois, 504 P.2d 1380 (Utah 1973)) and others in which the Court has affirmed awards of inherited property only to the inheriting spouse (citing Preston v. Preston, 646 P.2d 705, 706 (Utah 1982); Burke v. Burke, 733 P.2d 133 (Utah 1987); Newmeyer v. Newmeyer, 745 P.2d 1276 (Utah 1987); and Argyle v. Argyle, 688 P.2d 468 (Utah 1984)). Id. 305-06.

The Mortensen court expressly distinguished those cases in which the non-inheriting spouse was given all or a portion of the inheritance on the basis of several particular circumstances, one of which was when the wife (or non-donee spouse) would not be receiving alimony or attorney fees. Id. at 306. In this matter, Mrs. Schwartz received possession and half of the equity interest in the house, but since she was awarded neither alimony or attorney fees she could fit into this Mortensen exception.

The Court continued stating that the general "rule that property acquired by gift or inheritance by one spouse should be awarded to that spouse of divorce . . . *does not apply when . . . the acquiring spouse places title in their joint names in such a manner as to evidence an intent to make it marital property.*" Id. at 307 (italics added) (citations omitted). It is an uncontroverted fact that title to the Schwartz property was held in their joint names. (R. at 309, Findings 38, 39.) In summary then, the fact that Mrs. Schwartz was not receiving alimony or attorney fees, and the fact that the title was issued in joint tenancy, are two reasons the Utah Supreme Court has held will allow a court to award inherited or gift property to the non-donee or non-inheriting spouse.

Furthermore, after balancing and summarizing the case law supporting both positions the Mortensen Court concluded,

> Significantly, no case has been found where this Court has reversed a trial court's disposition of gifts or inherited property received by one party during the marriage. In

> almost every case, we have emphasized the wide discretion trial courts have in property division and have refrained from laying down any general rules for the disposition of gifts and inherited property.

Id. at 307. Thus, even if the property could be considered an inheritance intended only for husband, the trial court still maintained discretion over its division.

Finally, to distinguish all of the cases which support the award of property only to the inheriting or donee spouse, in every one of those cases there was no doubt that the property was intended to be a gift or inheritance. In Mortensen, stock was issued in only the name of the donee. Id. at 305. In Burke, the opposing party admitted that the property was an inheritance. 733 P.2d at 134. And in Argyle the husband's mother expressly made the gift to the husband and his brother. 668 P.2d at 469. Because the question of intent is a factual matter, and since the court found that the property was intended as joint property, this Court must uphold the trial court's discretion because it is supported by a reasonable basis. Crookston v. Fire Ins. Exch., 860 P.2d 937, 938 (Utah 1993).

V. The Trial Court Did Not Abuse Its Discretion In Dividing The Marital Business Without Joining The Husband's Parents As Parties.

Husband claims it was an abuse of the trial court's discretion not to join his parents as "necessary parties" to the divorce and division of marital assets, because they contributed a substantial amount of capital to the business the court divided. This

contention is without merit. First, the parents were not necessary parties. U.R.C.P. Rule 19(a). Second, the trial court has broad discretion in determining when a party will be joined and the trial court below alleviated any prejudicial effects in fashioning the award. U.R.C.P. Rule 19(b); Seftel v. Capital City Bank, 767 P.2d 941 (Utah Ct. App. 1989) aff'd sub nom; Landes v. Capital City Bank, 795 P.2d 1127 (Utah 1990).

A. Husband's Parents Were Not Necessary Parties To The Divorce And Division Of Marital Assets Under Utah Rule Civ. Proc. 19.

A necessary party "is one whose presence is *required* for a full and fair determination of his rights as well as of the rights of the other parties to the suit." Cowen & Co. v. Atlas Stock Transfer Co., 695 P.2d 109, 114 (Utah 1984) (italics added). While Mrs. Schwartz concedes that Mr. Schwartz's parents' testimony was important to the determination of various issues at trial, it does not follow that they were "required" to be parties. In fact, their very presence as witnesses was completely adequate to secure their interests in the money they loaned to the marital business. (R. at 307, Finding 54.) Rule 19(a) of the Utah Rules of Civil Procedure states in relevant part:

> **Persons to be joined if feasible.** A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action *if* (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may

> (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.

(italics added). Mr. Schwartz has failed to establish any of these elements, and is unable to do so. Furthermore, if Mr. Schwartz's position is accepted than any creditor of a marital asset would be of necessity made a party to the divorce proceedings. Divisions of marital property almost always include divisions of both assets and debts--the creditors need not be a party in order to assure payment of these debts.

B. The Trial Court Had Broad Discretion In Joining Parties And Alleviated Any Possible Prejudice To Parents In Fashioning The Award.

Once a party has been found a 'necessary party' under Rule 19(a), the next step is an analysis under Rule 19(b) of the Utah Rules of Civil Procedure which explains what a court can do when joining a necessary party isn't feasible. In that instance,

> the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measure, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for non-joinder.

The Utah Court of Appeals upheld the need for a two-part test, consisting of an analysis first under 19(a) and next under 19(b). Seftel v. Capital City Bank, 767 P.2d 941, 945 (Utah Ct. App. 1989). Obviously since the issue was raised for the first time on appeal, the trial court did not make this two-part analysis. "However," added the Seftel Court, "a trial court's failure to follow the two-step inquiry under Rule 19 is harmless error, if, upon a review of the record, there is clear evidence to support the trial court's ultimate conclusion." Id. In another context the Utah Supreme Court has said, "we may affirm trial court decisions on any proper ground(s) . . ." Buehner Block Co. v. UWC Associates, 752 P.2d 892, 895 (Utah 1988). The Court has also held that where evidence is admitted which might support a decision, but no specific finding was made, it can be concluded "that the court implicitly" made the necessary finding. Olympus Hills Shopping Center, Ltd. v. Landes, 821 P.2d 451, 455 (Utah 1991).

The record supports the trial court's discretion in not joining the husband's parents as 'necessary parties.' Step one of the inquiry, an analysis under 19(a), was accomplished in part "A" above. Under 19(b), or step-two, the division of the marital business (in which grandparents had a financial interest) was not prejudicial. The court so shaped the relief as to require both parties to share equally in the debt to the grandparents. The findings of fact established the following:

> 52. To start the business, they [Mr. and Mrs. Schwartz] borrowed $20,000 from Father's

> parents. Before separation they borrowed an additional $25,000 from Father's parents.
>
> 53. Neither of these loans were evidenced by a promissory note, nor were any terms of repayment established for the loans.
>
> 54. Since the separation in 1993, parents have loaned an additional $21,333.30 to Father for the business. For these loans to the business, parents are owed $66,333.30 by the parties, plus interest.
>
> 67. Post-separation, Father's parents requested that the loans be reduced to written documentation and they requested repayment. While the Court will not so order, the parties do owe the parents the described sum and appropriate written evidence should be prepared.

(R. 303-05.) The grandparents' interest in repayment of the business loans was adequately protected by the trial court's judgment. Hence, even if they could be considered 'necessary parties' under 19(a), the trial court would not have abused its discretion in refusing join them as parties.

VI. The Trial Court Did Not Abuse Its Discretion In Requiring The Husband To Pay Half Of The Total Fees Of The Custody Evaluator.

The decision whether or not to award costs or attorney fees in the discretion of the trial court. Crockett v. Crockett, 836 P.2d 818, 821 (Utah Ct. App. 1992); Rudman v. Rudman, 812 P.2d 73, 77 (Utah Ct. App. 1991). The award of either party's costs or attorney fees requires a finding of financial need of the payee and the financial ability to pay of the payor. Id. In the matter below the trial court did not order either party to pay the other's costs or fees. The trial court found as follows:

> 91. Nor does Mother demonstrate significant need. . . .
>
> 92. Father's attorney fees are in the sum of $8,020.00, which appears necessarily incurred and reasonable in amount.
>
> 93. Mother's attorney fees are in the sum of $5,125.00, which appears necessarily incurred and reasonable in amount.
>
> 94. Neither party has the capacity to pay the other's fees.
>
> 95. The cost of the custody evaluation should be borne equally by both parties. To the extent not already done, each should pay one-half of the evaluation.

(R. 301.) The Amended Decree of Divorce ordered, "12. The Court orders that there is an additional sum of $731.98 due and owing to Elizabeth B. Stewart, who performed the custodial evaluation." (R. 319.) Attorney for Mr. Schwartz objected to this finding, claiming that it was not the court's intent for husband to have to pay half of the costs of calling the custodial evaluator as a witness. (R. 326.) Counsel for Mrs. Schwartz responded arguing the following:

> Defendant is objecting to charges made by Elizabeth B. Stewart, who charged $731.98 for coming to court. Elizabeth B. Stewart was the psychologist who was appointed by the Court to make an analysis of the plaintiff, the defendant and their children and to report to the Court, which she did. Both the plaintiff and defendant stipulated that Elizabeth B. Stewart would be appointed. It was well known that she would make a recommendation and it was well known that she would be called to court to testify. She was not plaintiff's witness in the sense that she was retained by the plaintiff and paid by the plaintiff, as the defendant did in calling his own expert, Dr. Gayle Stringham. Rather the court appointed Elizabeth B. Stewart, who performed

> an evaluation. As part of that evaluation, she came to court and testified as to her findings. It is, therefore, only fair that both parties would share in the cost of her coming to court and testifying.

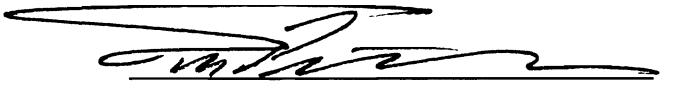
(R. 329.) Accepting this argument (as the court must have done because the decree was not modified) the charges from Elizabeth B. Stuart were not *plaintiff's costs*, but were *court costs* to be divided equally between the parties. Because the court was not requiring Mr. Schwartz to pay plaintiff's costs, but was rather requiring both parties to bear their equal share of the court appointed evaluators' total fees, no finding of need or ability to pay was necessary. Finally, since the above-quoted paragraph demonstrates a reasonable basis upon which that decision was based, the court did not abuse its discretion. See *supra* Crookston.

CONCLUSION

This Court should affirm the factual findings and discretionary decisions made by trial court below. First, all factual findings must be upheld because all are adequately supported by the record; furthermore, since Mr. Schwartz has failed to marshal the evidence this Court must assume the findings are sufficiently supported by the record and consequently, not clearly erroneous. Second, the remaining discretionary decisions of the court must also be affirmed because each was supported by a reasonable basis

and none were arbitrary, capricious or an abuse of discretion.

DATED this 29 day of March, 1995.



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MAILING CERTIFICATE

I hereby certify that a true and correct copy of the foregoing was mailed to the following, postage prepaid, this 8th day of March, 1995.

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